IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.814 OF 2002

IN

SUIT NO.1440 OF 1992

Auchtel Products Ltd. ...Appellants

v/s

M/s Tarun Traders ...Respondents

Mr Paritosh Jaiswal with Mr Deepan Desai i/b M/s Kanga and Co. for Appellants.

Mr L.H. Rambhia for Respondents.

CORAM : D.K. DESHMUKH AND J.H. BHATIA JJ.

DATE : 25TH OCTOBER 2007.

P.C. :-

1. By this appeal, the appellants challenge the judgment and decree passed by the learned Single Judge of this Court in suit No.1440 of 1992. That suit was filed by the plaintiffs - respondents, which is a partnership firm, against the present appellants - defendants which is a Public Limited Company for a money decree. The suit was for recovery of money towards loss or damage and interest as principal amount due to the plaintiffs from the defendants was already paid. The plaintiffs in the plaint were claiming interest firstly on the basis of oral agreement and secondly on the basis of custom. The defendants resisted the suit by filing written statement and denied either oral agreement or any custom in relation to payment of interest. The plaintiffs, in support of their case examined three witnesses, P.W. 1 - Chedda, who is partner of the plaintiff firm, P.W. 2 - Vaghela who is employee of the plaintiffs and P.W.3 - Rohit Thakkar, who is a broker. Rohit Thakkar was examined to prove the custom and Chedda and Vaghela were examined to prove the oral agreement. There were also documents produced by the parties. The learned Single Judge framed following issues on the basis of pleadings :-

1) Whether the plaintiffs prove that it was agreed between the plaintiff and the defendants that the defendants would be liable to pay to the plaintiffs bill amounts within the credit period of 60 days ?

2) Whether the plaintiffs prove that the defendants would be liable to pay to the plaintiffs interest at 18 % p.a. on the amounts of the bills remaining unpaid from time to time after the credit period of 60 days ?

3) Whether the plaintiffs prove that the defendants are liable to pay to the plaintiffs the amount of Rs.3,10,121.37 as interest as agreed between the parties ?

4) Whether the plaintiffs prove that in the alternative to claim of interest as agreed as per clause 3 above, the defendants are liable to pay to the plaintiffs the said sum of Rs.3,10,121.37 as compensation for loss or damage suffered by the plaintiffs alleged in

para 12 of the plaint ?

5) Whether the plaintiffs prove that in the alternative to claim of the said sum as per clauses 3 and 4 above, the defendants are liable to pay to the plaintiffs interest at 18 % as prevalent market rate on the bill amounts remaining unpaid after credit period of 60 days as per custom, practice and usage in the market ?

6) Whether the defendants are liable to pay to the plaintiffs interest at 18 % p.m. on the bill amounts remaining unpaid from time to time @ 18 % p.a. under section 3(a) of the Interest Act 1978 and / or under section 73 of the Indian Contract Act and / or under section 61(1) of the Sale of goods Act or in the alternative in equity ?

7) Whether the plaintiffs are entitled to decree as prayed ?

8) What order ?"

. The suit was decided by judgment dated 7th February 2000. The learned Judge held that both oral agreement and the custom have been proved and therefore, the learned Judge decreed the suit directing the appellants to pay interest @ 18 % p.a. The present appeal is against that judgment.

2. The learned counsel appearing for appellants submits that so far as the case of oral agreement to pay interest is concerned, the defendant is a Public Limited Company, the averments in the plaint do not specify as to when and with whom the oral agreement was arrived at. In the deposition also, the partner of the plaintiff - firm or the employee - Rajeshkumar Vaghela have not specifically stated as to with whom, on what date the oral agreement was arrived at and what were the terms of that agreement. The learned counsel further submits that so far as the custom is concerned, the only witness examined is P.W.3 - Rohit Thakkar, he does not prove the custom because according to his deposition, he was working in the market as broker for three years and the transaction was much before that time. Therefore, according to the learned counsel, neither oral agreement has ben established nor custom has been proved. The learned counsel appearing for original plaintiffs, on the other hand, relies on the oral deposition of the witness. He also relies on the correspondence between

the parties, especially the letter dated 24th March 1990. According to him, in that letter, agreement to pay interest is implied. The learned counsel further submits that even the custom to pay interest is established by the witness examined on behalf of the defendants.

3. Now in the light of these rival submissions if the record of the case is perused, it becomes clear that the pleadings about oral agreement to pay interest are contained in paragraph 3 of the plaint. They read as under :-

> "3. The plaintiffs state that it was inter-alia agreed by and between the plaintiffs and the defendants that the defendants would pay to the plaintiffs the price of the said goods sold and delivered to the defendants under the plaintiffs' said bills within the credit period of 60 days from the respective dates of the said bills and that if the defendants failed to pay to the plaintiffs the said price of the said goods within the said credit period, the defendants would be liable to pay to the plaintiffs interest @ 18 % p.a. on the amounts remaining unpaid from time to time from the respective

> due dates being the dates of payment after allowing the said credit period of 60 days from the dates of the said bills."

. The plaintiff is a partnership firm, the defendant is a public limited company. In the pleadings, neither the name of the partner of the plaintiff firm who entered into the agreement is disclosed nor the name of the officer of the defendant - Company with whom the agreement is alleged to have been entered into is disclosed. It is also not pleaded that the officer with whom the agreement was entered into was authorised by the Company to enter into the agreement. So far as the deposition is concerned P.W. 1 - Chheda states thus :-

> "Orally, the defendants had agreed to make payment of interest. Inspite of letters and demands, defendants have not paid any interest. Defendants are liable to pay interest as claimed in the suit."

. He also claims in his deposition that the defendants are liable to pay interest @ 24 % p.a. Now in the deposition, neither partner of the plaintiffs with whom the agreement was entered into nor the officer of the defendants with whom the agreement is alleged to

have been entered into are named nor is it claimed that any officer of the defendant - Company was authorised by that Company to enter into oral agreement with any of the partner of the plaintiff - firm. So far as the witness Rajeshkumar Vaghela is concerned, in his cross-examination he states thus :-

> " I am personally not aware of the terms of contract between the plaintiffs and the defendants that interest was payable after 60 days."

4. Now, so far as the correspondence is concerned, it appears that the plaintiffs first demanded interest only after the amount of principal was paid. Demand for interest was made for the first time on 24th January 1992 when the amount of principal was paid admittedly on 22nd January 1992. By letter dated 24th January 1992, interest was demanded. That letter was replied to by the defendants. The reply is dated 7th February 1992. The defendants in their reply clearly denied their liability to pay any interest. The learned counsel appearing for plaintiffs relied on the letter dated 24th March 1992. According to him, following statement found in that letter dated 24th March 1992 amounts to implies agreement to pay interest :-

> "We do realise that your payment has been delayed beyond the agreed credit terms, but considering general conditions in the market and liquidity crunch most companies were facing, you will agree that we have done our level best to clear your payment as fast as possible.

. In our opinion, no implied agreement can be traced in the above referred statement especially because of what follows in the said letter which reads thus :-

> "Though we do sincerely regret the inconvenience caused to you due to delayed payments from our end, we are extremely sorry to state that we cannot accept interest charges to the tune of more than Rs.3 lakhs. Considering our loss standing and cordial business relations, we request you to kindly withdraw your interest claim."

. Thus, no oral agreement to pay interest can be said to be implied in this letter. From the letter it appears that the plaintiffs had asked the defendants to pay interest, but the defendants expressed its inability to agree to pay interest. The letter does not show that

the defendants had agreed to pay interest. In any case, oral agreement to pay interest as pleaded by the plaintiffs can not be deduced from the letter. In our opinion, therefore, the learned Single Judge was not justified in recording a finding that the plaintiffs have established that there was an oral agreement to pay interest between the parties.

5. In the alternative, it was the case of the plaintiffs that there was a market custom to pay interest. To prove that market custom, P.W.3 - Rohit Thakkar was examined. He is a broker working in the market. In examination-in-chief, he states thus :-

> "If payment is not made within the contracted time it is an old custom in the market that the buyer pays the interest after the said agreed period. I have been doing the business as a broker for the last 3 years."

. This witness has been examined on 9th December 1999. In his cross-examination he stated thus :-

> "My knowledge about custom and usage is about 3 years when I have worked as a broker. I do not know the custom and usage before that."

. According to the plaintiffs, the alleged oral agreement between the parties was before January 1992. Therefore, this witness can by no stretch of imagination be said to have established existence of any custom to pay interest in the year 1992. There is no other evidence pointed out to us so far as the aspect of custom is concerned. Therefore, in our opinion, the learned Single Judge was not justified in recording a finding that the plaintiffs have established existence of custom in the market about payment of interest on delayed payment. Thus, we find that the plaintiffs have totally failed to establish either oral agreement to pay interest or any custom to pay interest and therefore, in our opinion, the learned Single Judge was not justified in decreeing the suit. In the result therefore, appeal succeeds and is allowed, the judgment and decree impugned in the appeal is set aside. The suit filed by the respondents is dismissed with no order as to costs.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary of the Court.

. Certified copy expedited.

(D.K. DESHMUKH J.)

(J.H. BHATIA J.)